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AL-HAMIDI CHEK MAT

v.

DR GANGA DEVI & ORS

B

HIGH COURT MALAYA, ALOR SETAR
HO MOOI CHING JC
[CIVIL SUIT NO: 22-345-2006]
25 MARCH 2009

C ***TORT:*** *Negligence - Medical negligence - Claim for damages - Appeal against decision allowing plaintiff's application to amend statement of claim - Addition of new party - Whether decision appealable - Limitation - Rules of the High Court 1980, O. 20 r. 5(1), O. 56 r. 1 - Limitation Act 1953, s. 6(1)*

D ***CIVIL PROCEDURE:*** *Pleadings - Amendment of statement of claim - Addition of new party - Whether decision allowing plaintiff's application to amend statement of claim appealable - Limitation - Rules of the High Court 1980, O. 20 r. 5(1), O. 56 r. 1 - Limitation Act 1953, s. 6(1)*

E ***CIVIL PROCEDURE:*** *Amendment - Statement of claim - Addition of new party - Whether decision allowing plaintiff's application to amend statement of claim appealable - Limitation - Rules of the High Court 1980, O. 20 r. 5(1), O. 56 r. 1 - Limitation Act 1953, s. 6(1)*

F ***CIVIL PROCEDURE:*** *Appeal - Appeal against decision of Deputy Registrar - Whether decision allowing plaintiff's application to amend statement of claim appealable - Limitation - Rules of the High Court 1980, O. 20 r. 5(1), O. 56 r. 1 - Limitation Act 1953, s. 6(1)*

G ***LIMITATION:*** *Accrual of cause of action - Action for negligence - Appeal against decision allowing plaintiff's application to amend statement of claim - Addition of new party - Whether decision appealable - Rules of the High Court 1980, O. 20 r. 5(1), O. 56 r. 1 - Limitation Act 1953, s. 6(1)*

H The plaintiff, as the husband and administrator of the deceased's estate, brought the present claim for damages arising out of the defendants' alleged negligence in treating the deceased, resulting in her death (on 27 December 2000). On 16 April 2008, the Deputy Registrar allowed an application by the plaintiff under O. 20 r. 5(1)
I Rules of the High Court 1980 ('RHC') to amend his statement of

claim, in effect, adding a third defendant ('D3'). This was an appeal against that decision by the second defendant ('D2') pursuant to O. 56 r. 1 RHC. The first defendant ('D1') raised a preliminary issue as to whether such a decision was appealable. Relying on the decision of the Court of Appeal in *Dato' Seri Anwar Ibrahim v. PP*, it was submitted that only decisions that have the element of finality can be the subject of appeal.

Held (allowing the appeal with costs):

(1) In the instant case, the decision appealed against was not made in the course of a trial or hearing. Although there is no definition of the words "trial" or "hearing", the present case, being an action begun by writ, was clearly at the pre-trial stage. This was evident from the fact that no directions had yet to be given under O. 34 RHC relating to "Pre-trial Case Management". The decision of the Court of Appeal in *Dato' Seri Anwar Ibrahim (supra)* was made in a criminal matter. With respect, the case of *Syarikat Tingan Lumber Sdn Bhd v. Takang Timber Sdn Bhd* (a decision of the Court of Appeal in a civil appeal), being authority for the proposition that the only decisions which cannot be appealed against are those made in the course of a trial or hearing, is of greater application in this case. In the premises, the decision made by the Deputy Registrar was appealable under O. 56 RHC. *Syarikat Tingan Lumber Sdn Bhd v. Takang Timber Sdn Bhd* (foll); *Dato' Seri Anwar Ibrahim v. PP* (dist). (paras 9 & 11)

(2) It was undisputed that the deceased died on 27 December 2000 and the plaintiff's cause of action (founded on the tort of negligence) accrued on that date. Following s. 6(1) Limitation Act 1953, if the plaintiff intended to sue D3, he should have done so by 26 December 2006. The action against D1 and D2 was filed on 21 December 2006 whereas the plaintiff's application to amend the statement of claim was filed on 27 June 2007, well outside the period of limitation for bringing an action against D3. Therefore, the plaintiff's claim against D3 was barred by limitation and should have been disallowed. *Government of Malaysia v. Mohamed Amin bin Hassan* (foll); *Suruhanjaya Pelabuhan Pulau Pinang v. Boss Ramasamy* (foll). (paras 15, 16 & 19)

Case(s) referred to:
Dato' Seri Anwar Ibrahim v. PP [1999] 1 CLJ 537 CA ***(dist)***
Government of Malaysia v. Mohamed Amin Hassan [1985] 1 LNS 79 FC ***(foll)***
HSBC Bank Malaysia Bhd v. Macquarie Technologies (Malaysia) Sdn Bhd & Another Appeal [2004] 3 CLJ 121 CA ***(refd)***
JR Lincks College of High Education v. Majlis Perbandaran Melaka [2008] 3 CLJ 808 CA ***(refd)***
Raphael Pura v. Insas Berhad & Anor [2000] 4 CLJ 830 CA ***(refd)***
Raphael Pura v. Insas Berhad & Anor [2003] 1 CLJ 61 FC ***(refd)***
Suruhanjaya Pelabuhan Pulau Pinang v. Boss Ramasamy [2000] 4 CLJ 168 ***(foll)***
Syarikat Tingan Lumber Sdn Bhd v. Takang Timber Sdn Bhd [2003] 2 CLJ 177 CA ***(foll)***
Yamaha Motor Co Ltd v. Yamaha Malaysia Sdn Bhd & Ors [1983] 1 CLJ 191; [1983] CLJ (Rep) 428 FC ***(refd)***

Legislation referred to:
Courts of Judicature Act 1964, s. 3
Limitation Act 1953, s. 6(1)
Rules of the High Court 1980, O. 15, O. 20 r. 5(1), (3), O. 34, O. 56 r. 1(1)
Subordinate Courts Rules 1980, O. 15 r. 1(4)

Other source(s) referred to:
Halsbury's Laws of England, 3rd edn, vol 24, p 201, para 358

For the plaintiff - Arunachalam Ramiah; M/s Arun & Co
For the 1st defendant - Rajivan Nambiar; M/s Sitam & Assoc
For the 2nd defendant - Simon Murali; M/s Lio & Partners

Reported by Suresh Nathan

JUDGMENT

Ho Mooi Ching JC:

[1] This is a claim in medical negligence. Shortly stated, the plaintiff claims as the husband and administrator of the estate of the deceased, Maimunah binti Ahmad for damages arising out of the alleged negligence of the defendants in treating the deceased, resulting in her death. According to the indorsement on the writ, she died on 27 December 2000.

[2] On 16 April 2008 the learned deputy registrar allowed an application by the plaintiff to amend his statement of claim (encl. 9), in effect, adding a 3rd defendant, Dr. Indar Singh ('D3'). This is an appeal against that decision by the 2nd defendant ('D2') to the judge in chambers pursuant to RHC O. 56 r. 1.

Preliminary Issue

[3] A preliminary issue was raised as to whether an appeal lies against such a decision.

[4] Rules of the High Court O. 56 r. 1(1) reads:

> An appeal shall lie to a Judge in Chambers from any judgment, order or decision of the Registrar.

[5] It was argued for the 1st defendant ('D1') that the decision appealed against is not appealable. It is common ground that the definition of 'decision' in s. 3 of the Courts of Judicature Act ('CJA') applies to O. 56 of the RHC. Section 3 of the CJA (as amended by the Act A 1031 of 1998 which came into force on 31 July 1998) provides:

> ... unless the context otherwise requires:
>
> ...
>
> "decision" means judgment, sentence or order, but does not include any ruling made in the course of a trial or hearing of any cause or matter which does not finally dispose of the rights of the parties.

[6] It was submitted for D1 that only decisions that have the element of finality can be the subject of appeal. Reliance was placed on the decision of the Court of Appeal in *Dato' Seri Anwar Ibrahim v. PP* [1999] 1 CLJ 537 where NH Chan JCA said:

> This new definition of "decision", as in the amendment, does not include a judgment or order which does not deal with the final rights of the parties on the matters in dispute. In other words, what has been excluded from the meaning of the word "decision" is the type of judgments and orders which is termed "interlocutory" by *Halsbury's Laws of England*, 4th Edn, Vol 26, para 506, at p 240, which reads:

A 506. Interlocutory judgments and orders.

An order which does not deal with the final rights of the parties, but either (1) is made before judgment, and gives no final decision on the matters in dispute, but is merely on a matter of procedure, or (2) is made after judgment, and merely directs how the
B declarations of right already given in the final judgment are to be worked out, is termed 'interlocutory'.

Chan JCA went on to explain:

Shortly stated, what the amendment means is that a judgment or
C order which does not deal with the final rights of the parties, but is made pendente lite, and gives no final decision on the matters in dispute, is not a "decision" within the meaning of that word in the current version of s. 3 Courts of Judicature Act, and therefore is not appealable. It makes no difference that such a judgment or order is
D final, that is to say conclusive, as to the subordinate matter with which it deals. For instance, an order granting or refusing bail is final (conclusive) as to the application with which it deals but it is still an order which does not deal with the final rights of the parties. Such an order is made before judgment or sentence and gives no final decision on the matters in dispute. A judgment or order, even
E though not conclusive (final) of the main dispute, may be conclusive (final) as to the subordinate matter with which it deals. In this way, an interlocutory judgment or order may be conclusive (final) as to the subordinate matter with which it deals even though it is not conclusive (final) of the main dispute.

F **[7]** More specifically, the learned judge added:

A decision made pending the trial of the charges against the appellant is not, in our considered opinion, a decision (ruling) that had the effect of finally determining the rights of the appellant. It is
G only the outcome of the trial that would have the effect of finally disposing of his rights. A decision on bail (by the court of first instance), whether the grant or refusal of it, will not finally determine the rights of the appellant in the outcome of his trial. That being so, the order of the High Court in refusing to admit the appellant to bail is not appealable to the Court of Appeal.
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[8] Chan JCA interpreted s. 3 of the CJA to exclude interlocutory decisions and then relied on *Halsbury's Laws of England* to elucidate the meaning of 'interlocutory'. Applying this authority, a decision allowing the plaintiff to amend his pleadings is clearly not a decision
I finally disposing of the rights of the parties and may not be

appealed against. However, the Court of Appeal in *Syarikat Tingan Lumber Sdn Bhd v. Takang Timber Sdn Bhd* [2003] 2 CLJ 177 took the approach that one needs to merely look at the cold print of s. 3 CJA as amended. In the course of his judgment, Pajan Singh Gill JCA said that the intention of the legislature when drafting the amendment was that it should serve as a filter process for appeals. It was pointed out that in deciding whether a decision is appealable the question to be asked is not only whether a ruling does or does not dispose of the final rights of the parties but also whether it was a ruling made in the course of a trial or hearing, of any cause or matter. It was held that if it was not a ruling made in the course of a trial or hearing, 'regardless of the fact that it did not dispose of the rights of the parties, it may not be excluded by the definition of "decision" as provided in s. 3 of the CJA as amended, and is therefore appealable'. In that case, it was held that the ruling of the learned deputy registrar of the High Court, on an issue regarding the admissibility of certain documents in the course of a hearing, for assessment of damages, was not appealable. On the facts of that case, as the ruling on admissibility was made in the course of a hearing, it was clearly excluded by s. 3 of the CJA and the appeal was not competent.

[9] In the instant case, the decision appealed against was not made in the course of a trial or hearing. Although there is no definition of the words 'trial' or 'hearing', the instant case being an action begun by writ, we are clearly at the pre-trial stage. This is evident from the fact that no directions have as yet been given under RHC O. 34 relating to 'Pre-trial Case Management'.

[10] Learned counsel for D2 also submitted the cases of *Raphael Pura v. Insas Berhad & Anor* [2000] 4 CLJ 830, CA; *Raphael Pura v. Insas Berhad & Anor* [2003] 1 CLJ 61, FC; *HSBC Bank Malaysia Bhd v. Macquarie Technologies (Malaysia) Sdn Bhd & Another Appeal* [2004] 3 CLJ 121 and *JR Lincks College of High Education v. Majlis Perbandaran Melaka* [2008] 3 CLJ 808 in support of his contention that decisions giving or refusing leave to amend pleadings are appealable as that was the subject matter of the appeals in those cases.

[11] To my mind, although the competence of the appeals was not challenged in those cases, they lend some support to the argument that such rulings are appealable. The decision of the Court of

Appeal in *Dato' Seri Anwar Ibrahim*'s case *(supra)* was made in a criminal matter. With respect, I am of the view that *Syarikat Tingan Lumber*'s case *(supra)* (a decision of the Court of Appeal in a civil appeal) being authority for the proposition that the only decisions which cannot be appealed against are those made in the course of a trial or hearing, is of greater application in this case. In the premises, the decision made by the learned Deputy Registrar is appealable under O. 56 of the RHC.

Merits Of The Appeal

[12] The plaintiff's application to amend his statement of claim was made under RHC O. 20 r. 5(1) which reads:

> Subject to O. 15 rules 6, 7 and 8 and the following provisions of this rule, the Court may at any stage of the proceedings allow the plaintiff to amend his writ, or any party to amend his pleading, on such terms as to costs or otherwise as may be just and in such manner (if any) as it may direct.

[13] The purpose of the proposed amendments was ostensibly to include material facts and this need only became apparent on perusal of the defence filed by D1 and D2. The effect of the amendments was to add a third defendant who was allegedly involved in providing the deceased with ante-natal care. It cannot be denied that the application was made under O. 20 r. 5 and not O. 15, as there is no prayer to add a party. I do not propose to delve into the issue of whether an application to add a party should have been made under O. 15 in the circumstances of this case.

[14] It is trite law that in general courts tend towards allowing applications to amend pleadings provided that such amendments cause no injustice to the other parties. Three basic questions that should be considered to determine whether injustice would result are:

(a) whether the application was *bona fide*;

(b) whether the prejudice caused to the other side can be compensated by costs; and

(c) whether the amendments would not in effect turn the suit from one character into a suit of another and inconsistent character (see *Yamaha Motor Co Ltd v. Yamaha Malaysia Sdn Bhd & Ors* [1983] 1 CLJ 191; [1983] CLJ (Rep) 428, FC).

[15] It is undisputed that the deceased died on 27 December 2000 and the plaintiff's cause of action accrued on that date. The action is founded on the tort of negligence. Section 6(1) of the Limitation Act 1953 provides:

> Save as hereinafter provided the following actions shall not be brought after the expiration of six years from the date on which the cause of action accrued, that is to say:
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> (a) actions founded on a contract or on tort; ...

[16] I accept the submission of learned counsel for D2 that if the plaintiff intended to sue Dr. Indar Singh, he should have done so by 26 December 2006. The action against D1 and D2 was filed on 21 December 2006. The plaintiff's application to amend the statement of claim (encl. 9) was filed on 27 June 2007, well outside the period of limitation for bringing an action against Dr. Indar.

[17] In *Government of Malaysia v. Mohamed Amin bin Hassan* [1985] 1 LNS 79, the plaintiff/respondent was the driver of a car involved in an accident as a result of which one of his passengers who was his son, died while he and his other passenger, his wife, were injured. He originally brought an action against the defendants on behalf of the deceased's estate within the three year limitation period prescribed by the Public Authorities Protection Act 1948 but after the expiry of the limitation period, on appeal he was allowed by the High Court to amend his statement of claim by adding himself as 1st plaintiff and his wife as 2nd plaintiff in their personal capacities under O. 15 r. 1(4) of the Subordinate Courts Rules 1980 (equivalent to O. 20 r. 5(1) RHC). The Federal Court decided that it was not permissible under any provision of O. 15 r. 1 of the SCR to add a new and different party, particularly when the period of limitation affecting the proposed plaintiff had expired. The court had no power to resuscitate an action which must fail in limine upon a plea of limitation. Reference was made to *Halsbury's Laws of England*, 3rd edn, vol 24, p. 201, para. 358 to this effect:

> The court will refuse to allow a writ to be amended by the addition of a party when the effect of the amendment will be to defeat the operation of a statute.

[18] Both parties had relied on the case of *Suruhanjaya Pelabuhan Pulau Pinang v. Boss Ramasamy* [2000] 4 CLJ 168. However, in my opinion, that case favours the appellant in the instant case. In that case, the appellant appointed the plaintiff/respondent as a Pegawai

A Keselamatan in 1971 but informed him by letter dated 30 March 1983 that he had been retired on medical grounds. The plaintiff applied for a declaration that his retirement was unlawful and for reinstatement, naming the appellant as 1st defendant and the Government of Malaysia as 2nd defendant. In 1995, the plaintiff was
B allowed to amend his writ and statement of claim by substituting Penang Port Sdn. Bhd. ('PPSB') as the 1st defendant in place of the appellant which ceased to be a party. In 1996, the plaintiff's application to amend his amended writ and statement of claim by reinstating the appellant as the 1st defendant and naming the
C existing 1st defendant as the 3rd defendant, was disallowed by the Court of Appeal. It was held that although it was not stated in the summons-in-chambers under which rule the application was made, the plaintiff was in fact relying on O. 20 r. 5(3). However that rule only allows an applicant to correct a misnomer or a genuine
D mistake which was not misleading as to the identity of the party intended to be sued. It did not apply to an application to add a party. The application to amend was disallowed as the plaintiff's cause of action against the appellant was barred by limitation.

E **[19]** Similarly, in the instant case, the plaintiff's claim against the proposed 3rd defendant was barred by limitation and should have been disallowed. As Lee Hun Hoe CJ (Borneo) observed in *Mohamad Amin*'s case *(supra)* the court should not try to extend the provisions of O. 15 r. 1 of the SCR beyond their natural and proper
F limit in order to supply omissions and defects nor strain them to the justice of an individual case.

[20] In the light of the foregoing, I allow the appeal with costs.

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